

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 29, 2005 Session

**JAMES DELLINGER AND GARY WAYNE SUTTON
v. STATE OF TENNESSEE**

**Direct Appeal from the Circuit Court for Sevier County
Nos. 97-75-III; 96-1185-III Rex Henry Ogle, Judge**

No. E2004-01068-CCA-R3-PC - Filed June 19, 2006

Following a joint trial, Petitioners, James Dellinger and Gary Wayne Sutton, were each convicted in Sevier County Circuit Court of the premeditated first degree murder of Connie Branum and the burning of personal property. Each Petitioner received a life sentence for the murder conviction and a consecutive two-year sentence for the burning of personal property conviction. Their convictions and sentences were upheld on appeal. *State v. Gary Wayne Sutton and James Anderson [sic] Dellinger*, No. 03C01-9403-CR-0090, 1995 WL 406953 (Tenn. Crim. App., at Knoxville, July 11, 1995). Petitioners filed separate petitions for post-conviction relief. After a combined evidentiary hearing conducted on two separate days, the trial court denied post-conviction relief to Petitioners. By order of this Court, Petitioners' appeals of the dismissal of their petitions for post-conviction relief were consolidated for purposes of appeal. On appeal, Petitioners argue that their respective trial and appellate counsel rendered ineffective assistance of counsel because they (1) inadequately investigated the case against them in Sevier County; (2) failed to adequately investigate the death of Tommy Griffin in Blount County; (3) failed to appeal the trial court's denial of Petitioners' motion for a change of venue; and (4) failed to challenge on appeal the search warrant issued against Petitioner Dellinger's residence. Both Petitioners argue that they were denied their constitutional right to a fair trial because (1) the State failed to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); (2) the jury was improperly exposed to extraneous information during deliberations; and (3) the sequestered jury was separated from the attendance and control of the court officer at a function held during Petitioners' trial. In a separate issue, Petitioner Dellinger argues that his trial counsel rendered ineffective assistance of counsel because he failed to advise him of his right to testify at trial. After a thorough review of the record, we affirm the judgments of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

Richard L. Burnette, Knoxville, Tennessee (on appeal), for appellant, James Dellinger; Bryan E. Delius, Sevierville, Tennessee, and Catherine Y. Brockenborough, Nashville, Tennessee (at trial), for the appellant, James Dellinger; and Tim S. Moore, Newport, Tennessee, for appellant, Gary Wayne Sutton;

Paul G. Summers, Attorney General and Reporter; Michelle Chapman McIntire, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Steven R. Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

The evidence supporting the convictions of Petitioner Sutton and Petitioner Dellinger was summarized by this Court in Petitioners' direct appeal as follows:

[D]uring the Christmas season of 1991, Sutton was involved in a fight with Bill Griffin. Sutton repeatedly stomped on Bill Griffin's head and injured him. Dellinger was present during the fight, but he apparently did not participate. As a result of this incident, Bill Griffin was hospitalized.

On February 15, 1992, an officer from the Sevier County Sheriff's Department responded to a complaint involving Dellinger. When the officer arrived, Dellinger showed him a storage building adjacent to his trailer. Someone had fired several shots into the storage building. When the officer asked Dellinger who had shot into the building, he opined that one of the Griffins was responsible. He stated that the Griffins had done it before and that if he had to, he would wipe out the whole hill of Griffins.

Both of the appellants and Tommy Griffin were out drinking in Blount County on February 21, 1992. They were driving Sutton's dark colored Camaro, which only had one headlight burning. The three stopped at a bar called Howie's Hideaway. They stayed there until approximately 7:00 p.m., at which time they all left together.

A short period of time later, witnesses saw a dark colored Camaro with one headlight parked on the side of the road near the Hunt Road overpass. An individual outside the car was scuffling with someone inside the car. Another witness passing through the same area later saw a stumbling man with no shirt. When an officer arrived to investigate a report concerning the fight, he found Tommy Griffin sitting in the back of a pickup truck. Griffin had no shirt on, and he had scrapes and scratches on his ribs, abdomen, and face. Griffin had a strong odor of alcoholic beverage about him. He told the officer that he had been in a fight with his friends and that he "got put out of the car." When the officer asked Griffin to identify his friends, Griffin refused,

saying that they weren't good friends and that he didn't know their names. The officer then asked Griffin what the fight was about. Griffin became upset and, close to tears, repeatedly said, "I just can't tell you." The officer arrested Griffin for public intoxication and put him in the Blount County Jail.

At approximately 9:00 p.m. that same evening, a neighbor living between Tommy Griffin's trailer and Dellinger's trailer saw a white truck at Tommy Griffin's trailer. The truck's headlights were on and the passenger side door was open. Someone closed the passenger door. The truck left Griffin's trailer and drove to Dellinger's trailer. As the truck passed, the neighbor was able to identify it as Dellinger's white Dodge truck. Moments later, the neighbor saw fire coming from Tommy Griffin's trailer and had his wife call 911. An investigator later determined that the fire at the Griffin trailer was the result of arson.

Jennifer Branum testified that when she saw Tommy Griffin's trailer burning, she ran to Linda and James Dellinger's trailer to tell them about the fire. Linda Dellinger opened the door, and Branum saw the appellants coming down the hallway of the trailer toward the door. The appellants had their jackets on and they appeared to be out of breath. Their pants were wet almost to the knees.

Branum told the appellants that Tommy Griffin's trailer was on fire, and appellant Dellinger stated that they couldn't go down there because they were already in enough trouble. Branum asked the appellants if Tommy might be in the burning trailer. Sutton replied that he was not because he was with a girl in Blount County. Later, Jennifer Branum's older sister, Sandy, called the Dellinger residence to ask if Tommy Griffin had been in the trailer when it burned. Appellant Dellinger told her not to worry, because Tommy was in the Blount County Jail and he and Sutton were going to get him out. Jennifer Branum saw appellant Dellinger remove a long object wrapped in a sheet from behind the seat of his truck and place it in the front seat of Linda Dellinger's car. The appellants then left the Dellinger residence in the car. The next day, she saw both appellants remove the same object from the car and place it under Dellinger's trailer.

At approximately 11:25 p.m., the appellants arrived at the Blount County Jail. Dellinger posted a cash bond, and Tommy Griffin left the jail with the appellants. Thirty minutes later, a witness some nine miles away from the jail heard two shots fired near his home. The witness testified that the sound of the shots came from the direction of Manning Lane. These events transpired on a Friday night. The following Monday, Tommy Griffin's body was discovered near Manning Lane. Griffin had been shot in the head with "00" buckshot. Officers found two spent Remington Peters 12 gauge shotgun shells near Griffin's body. A forensics expert from the Tennessee Bureau of Investigation determined that the spent shells were fired from the same shotgun as spent shells recovered from near Dellinger's trailer.

When Sutton and Dellinger returned from the jail without Tommy Griffin, Griffin's sister Connie Branum became concerned. When Griffin still had not returned the next day, she went to look for him. She left her two children with a friend and took a picture of Tommy Griffin with her. She stopped at the Townsend Shopping Center and asked an employee if Griffin had been there the previous day. She met the appellants there at the shopping center and left with them.

Connie Branum and the appellants went to Howie's Hideaway. A waitress testified that Connie Branum was upset when they first arrived. Branum asked her if she had seen with whom her brother had left the bar the previous day. The waitress became confused, and when she attempted to answer, Dellinger told her to go and get their beers. Another waitress heard Dellinger say:

The last time we seen [Griffin] was up the road a piece, and he was with a short, fat, dark haired girl, and she was real ugly.... Well, we figured that he'd come back here because yesterday we picked him up from jail and come here and had a drink, and he doesn't know the area, so we thought he'd come back here."

Connie Branum left the bar with the appellants at approximately 7:00 p.m. Witnesses said that by the time the three left, Branum was intoxicated and boisterous. A waitress asked Branum if she was going to be driving and told her that she didn't need anything else to drink. The appellants told the waitress not to worry and that they would take care of Branum.

A couple living in the Clear Fork area heard a high-pitched, whistling noise coming from the woods near their house and saw a large fire burning there sometime between 8:00 and 8:30 p.m. that same evening. The next morning, [Barbara Gordon] saw a white truck leaving the woods. There were two people in the truck. She later identified this truck as appellant Dellinger's.

A week later, after hearing reports of Connie Branum's disappearance, the husband and the couple's son went to investigate the fire. They discovered a burned out car. They did not investigate further, because they were concerned that if they approached the car and examined it more closely, they would destroy evidence. Investigators found the body of Connie Branum in the driver's seat of her burned car.

The state arson examiner determined that the car fire was the result of arson. He concluded that an accelerant was poured on both the body and the interior of the car because of the extreme temperature required to produce the amount of damage present. Burn patterns on the floor of the vehicle also indicated that a liquid accelerant had run under the seats and burned there. He specifically eliminated the possibility that a cigarette or other smoldering ignitor had initiated the fire. While

samples taken from the interior of the vehicle revealed no accelerant when tested, the examiner testified that accelerants are sometimes completely consumed in a fire. Accelerants may also evaporate when exposed to the elements.

A forensic anthropologist who examined the remains in the car was able to identify the body as Connie Branum. The intense heat of the fire had partially cremated the body and “cooked” the internal organs to the point that it was impossible to determine the cause of death. Investigators discovered a spent .303 British shell casing inside the car. A forensics expert later determined that this shell casing was fired from a rifle seized from appellant Dellinger's residence.

Gary Wayne Sutton and James Anderson [sic] Dellinger, 1995 WL 406953, at *1-3. Each Petitioner was also convicted in Blount County of the premeditated first degree murder of Tommy Griffin, and the jury imposed the death penalty on each Petitioner. Petitioners’ convictions and sentences in that case were upheld on appeal in *State v. Dellinger*, 79 S.W.3d 458 (Tenn. 2002).

II. Post-Conviction Evidentiary Hearing

A. Petitioner Sutton’s Proof

David Webb, one of Petitioner Sutton’s trial counsel, was retained before charges were brought against Petitioner Sutton and was responsible for the filing of the pre-trial motions, including a motion to suppress Petitioner Sutton’s statement to the police and a motion for change of venue. Mr. Webb acknowledged that he was concerned about pre-trial publicity but he did not specifically recall a juror saying that he knew about “the stuff” Petitioners were doing before they committed the current offenses. Mr. Webb said that it was his recollection that Petitioner Sutton did not have standing to challenge the search warrant issued against Petitioner Dellinger’s residence, but he recalled that Ed Miller, counsel for Petitioner Dellinger, filed a motion to suppress.

Mr. Webb visited the scene of the crime prior to trial. Although he did not specifically remember what type of vehicle he was driving, Mr. Webb did not remember having any trouble traveling the logging road leading to the spot where Ms. Branum’s burned car was discovered. Mr. Webb acknowledged that he did not personally verify Barbara Gordon’s testimony that she saw a white truck exiting the woods the morning after she and her husband spotted the fire.

Mr. Webb said that he did not see a memorandum dictated by Chief Detective Dale Gourley of the Blount County Sheriff’s Department prior to trial. The memorandum was dated March 4, 1992, and reflected the substance of a telephone call that Detective Gourley received from Agent Sam Gregory, with the North Carolina State Bureau of Investigation. The memorandum described an offense in North Carolina involving Lester Johnson and Christina Hartman, the victim in that case. According to the memorandum, Ms. Hartman witnessed Lester Johnson’s cousin slash Mike Vaughan’s throat at a “biker party” in Sevier County, Tennessee. Ms. Hartman herself was later the victim of an attack by Lester Johnson at a “biker rally” in Cherokee, North Carolina. Ms. Hartman

refused Mr. Johnson's attempts to force her to engage in a sexual act, and he cut her throat. Mr. Johnson was arrested and tried in North Carolina for attempted first degree sexual offense. Ms. Hartman proposed calling Tommy Griffin and Connie Branum as her character witnesses, but neither appeared at Mr. Johnson's trial. The jury found Mr. Johnson not guilty of the charged offense at 5:57 p.m. on February 21, 1992, apparently because of a misunderstanding of the trial court's instructions, and Mr. Johnson was released from custody. According to the memorandum, Mr. Johnson was "supposedly a close associate of James Dellinger and Gary Sutton of Sevier Co[unty]."

The memorandum also states that "Agent Gregory advised that he understood that some of [Ms.] Hartman's family had been threatened that they were next after the disappearance of [Tommy] Griffin and [Connie] Branum." Agent Gregory suggested that the murders of Mr. Griffin and Ms. Branum may have been "contract/revenge killings in retaliation for the arrest of Lester Johnson." Mr. Webb acknowledged that he would have investigated Mr. Johnson had he seen Detective Gourley's memorandum.

Mr. Webb also stated that he did not see a letter written by Troy Turner, dated January 24, 1993, to Don Ogle and Jeff McCarter, with the Sevier County Sheriff's Department, or an undated letter from Bobby Floyd to Sevier County District Attorney General Al C. Schmutzer, Jr. Mr. Turner and Mr. Floyd were incarcerated in a federal penitentiary in Ashland, Kentucky, at the time the letters were written. Mr. Turner wrote:

You need to get in touch with me. It's about Garry Sutton and James Dellinger. Bobby Floyd and I have agreed we should contact you before this goes on any longer. Bobby has a lot, but won't agree to it without me, and together we can help. P.S. Bobby Floyd is here with me now. Contact both of us or neither one.

Mr. Floyd's letter, although lengthier, is along a similar vein. The letter is apparently in response to a visit from Mr. Schmutzer. Mr. Floyd stated that he has "changed in many ways" since his incarceration, and that he realized that he needed to "start helping" himself. He stated that he was willing to provide certain information, apparently in return for a sentence reduction or release from incarceration, but he warned that he would need "some Government protection because people would have to believe that [he] had won [his] appeal." Mr. Floyd stated that he had information on "stolen vehicles and truck highjackings in Sevier [County], and other drug and illegal activity that would make [his] case seem like small times." He also noted that he realized "that information about the Griffins is also of top priority to you."

Mr. Webb stated that it was impossible to prepare for Petitioner Sutton's trial in Sevier County without talking to the witnesses for the Blount County trial. Mr. Webb said that there were timing issues with Mr. Griffin's murder, and he personally timed the drive from the Blount County Detention Center to the location where Mr. Griffin's body was discovered. Mr. Webb, however, did not interview any of the other residents on Manning Lane and did not have an independent recollection of reviewing the report on Mr. Griffin's autopsy. Mr. Webb said that he visited Petitioner Sutton many times prior to trial.

On cross-examination, Mr. Webb stated that ninety percent of his time was spent on preparing for Petitioner Sutton's case in the months before trial. Mr. Webb said that he was "totally absorbed" in trial preparation. Mr. Webb testified that he discussed with Petitioner Sutton the testimony of various witnesses who reported that the Camero spotted on the night of Mr. Griffin's murder only had one headlight. Petitioner Sutton and his family members insisted that all four of the headlights of Petitioner Sutton's Camero were working at the time of the offenses. Mr. Webb said that he relied on this information as support for introducing the headlights as an exhibit. Mr. Webb acknowledged that he did the bulk of the work on appeal and stated that he chose the issues which he felt had the best chance of success on appeal.

Zane Daniel testified that he had practiced law for nearly forty years, and approximately fifty percent of his practice was devoted to criminal work. He joined Petitioner Sutton's defense team after the pre-trial motions had been filed. Mr. Daniel said that although counsel for both Petitioners worked together closely, there was no formal agreement not to introduce evidence that was favorable to one defendant but not the other. Mr. Daniel stated that he was aware that the officials from Blount and Sevier Counties coordinated their investigative efforts for the two trials, and he recollected that Blount County law enforcement officials testified at the Sevier County trial. Mr. Daniel said that he did not see the memorandum about Lester Johnson or the letters written by Mr. Floyd and Mr. Turner. Mr. Daniel said the defense team investigated other potential suspects, and he would have pursued Mr. Johnson as a possible suspect had he seen the memorandum. Mr. Daniel, however, did review other information pertaining to the Blount County case and employed an arson and ballistics expert. Mr. Daniel said that he did not review the report on Mr. Griffin's autopsy or interview the emergency medical personnel who retrieved his body.

Mr. Daniel said that it was his decision to introduce into evidence the headlights of Petitioner Sutton's Chevrolet Camero. He stated that although there was no evidence that Petitioners were in the Camero when the Sevier County offenses occurred, evidence concerning Mr. Griffin's murder in Blount County was introduced to establish the motive for the charges arising out of Ms. Branum's murder. Mr. Daniel said that he examined the headlights when they were brought into the courtroom, but he did not notice the manufacturer's date stamped on one of the headlights.

We observe at this point that at the post-conviction hearing both the State and the witnesses expressed a belief that the manufacturer's date stamp indicated that the headlights were manufactured after the offenses occurred. At trial, however, William Martin Barnes, testifying as a rebuttal witness, stated that the headlights were manufactured on February 13, 1992 according to the date stamp. Petitioner Sutton testified at trial that he purchased the Camero approximately six months prior to the offenses, or August 1991, and replaced one headlight at the time he purchased the car. Petitioner Sutton testified that the headlights were working at the time of the offense and when he was arrested. Five defense witnesses testified that all four of the Camero's headlights were working at the time of the offenses, and none of the headlights had been changed. Mr. Barnes testified at trial, however, that based on the manufacturer's date stamp, the headlight could not have been installed in the Camero six months prior to February 13, 1992.

Mr. Daniel testified at the post-conviction hearing that a juror recognized the significance of the date stamp. Mr. Daniel acknowledged that the date stamp was prejudicial to Petitioner Sutton's case.

On cross-examination, Mr. Daniel said that he discussed the headlights with Petitioner Sutton, his family members, and other witnesses who insisted that all of the Camero's headlights were working at the time of the offenses. The Camero was brought to the courthouse, and Mr. Daniel and a police officer tested the headlights in the parking lot. All four headlights were working.

On redirect examination, Mr. Daniel said that all of the Camero's headlights were removed and brought into the courtroom in a box. Mr. Daniel said that the police officer did not label any of the individual headlights as to the headlight's position on the vehicle when he removed them from the Camero.

B. Petitioner Dellinger's Proof

Susanna Thomas Webb was with the Sevier County Public Defender's Office at the time of the offenses and was appointed, along with Ed Miller, to represent Petitioner Dellinger. Ms. Webb testified that she entered private practice in 2000, and seventy-five percent of her practice was comprised of criminal defense work. Ms. Webb said that she had handled between thirty and forty murder cases, sixteen of which were capital cases.

Ms. Webb acknowledged that the introduction of the headlights was devastating. Ms. Webb said she observed the headlights being passed down the first row of jurors. The last juror in the front row turned one of the headlights over, and pointed something out to the juror next to him. The headlights were passed back down the row, and the jurors whispered and pointed to something on the headlight. Ms. Webb said that one of the jurors informed the trial court that there was "something amiss." Ms. Webb said that the case against Petitioner Dellinger was entirely circumstantial, but the introduction of the headlights erased any ground they may have gained in challenging the State's evidence.

Ms. Webb said that there was an initial confrontation within the community over the denial of Petitioners' requests for bond. Ms. Webb said that Petitioners' family members picketed the county jail when bond was denied. Ms. Webb also remembered that some of the potential jurors expressed familiarity with the case during voir dire, and recollected one juror stating his opinion about Petitioners' guilt. Ms. Webb could not remember whether or not she had used all of her peremptory challenges.

On cross-examination, Ms. Webb said that she met with Petitioner Dellinger many times prior to trial and felt adequately prepared to try the case. Ms. Webb stated that an investigator assisted her during her preparation for trial. The defense's theory rested upon attacking the State's circumstantial evidence and attempting to show that Petitioner Dellinger did not participate in the

offenses. Ms. Webb said that she discussed the issue of testifying with Petitioner Dellinger, and he decided that he would not testify.

Ed Miller testified that he had been in the Public Defender's Office since 1989 and had handled four or five capital cases before Petitioners' trial. Mr. Miller said that he worked closely with Petitioner Sutton's counsel on several issues. Mr. Miller said that he did not see the memorandum concerning Lester Johnson's trial in North Carolina prior to Petitioners' trial. Mr. Miller acknowledged that his files contained information about Mr. Floyd's federal case, but he did not remember reviewing the information because he did not think the case was related to Petitioner Dellinger's trial. Mr. Miller said that he could not recollect being denied access to the State's physical evidence, but he said he was not given possession of the beer cans or casts of tire tracks found next to Ms. Branum's car in order to independently test the items. Mr. Miller did not have an independent recollection of seeing the report on Mr. Griffin's autopsy.

Mr. Miller said that he was surprised when the State argued at the suppression hearing that the search of the Dellingers' residence was valid because Ms. Dellinger consented to the search. Mr. Miller said that the search warrant did not mention that Ms. Dellinger had consented to the search, and he was prepared to argue that the search warrant was invalid because of certain misrepresentations in the supporting affidavit.

Mr. Miller said that he visited Petitioner Dellinger more than three times prior to trial, and Ms. Webb and the investigator also met with him. Mr. Miller said he conveyed an offer of settlement to Petitioner Dellinger, but Petitioner Dellinger did not want to accept any offer that required him to enter a plea of guilty to the charged offenses.

Mr. Miller said that he did not interview any witnesses about the Camero's headlights, and he did not inspect the headlights prior to their introduction as an exhibit. He stated that he relied on Mr. Daniel's judgment in this regard. Mr. Miller acknowledged that a layperson could see a date stamped on the headlights, but he stated that he or she would probably not know what the numbers meant without specialized knowledge.

On cross-examination, Mr. Miller said that Petitioner Dellinger made the decision not to testify. Mr. Miller agreed that the introduction of the operable headlights at trial would have benefitted Petitioner Dellinger's case but for the discovery of the date stamp. Mr. Miller reiterated that he relied on co-counsel's investigation and the statements of Petitioner Dellinger's witnesses as support for introducing the headlights.

On redirect examination, Mr. Miller said that he did not meet with Petitioner Dellinger outside the courtroom after the headlights were introduced, and he did not remember discussing with Petitioner Dellinger whether that event necessitated any changes in the defense's planned strategy. Mr. Miller said that he met with co-counsel that night, however, to discuss the issue. Mr. Miller said that he did not file a motion for a continuance, but he did file a motion to sever on behalf of Petitioner Dellinger which was denied.

Johnny Wade McCarter testified that he was the foster son of James and Barbara Gordon. Mr. McCarter was fourteen years old at the time of the offenses. He and Mr. Gordon were riding in the woods in a dune buggy when they discovered Ms. Branum's burned car. Mr. McCarter said that he waited by the road while Mr. Gordon called 911. Mr. McCarter was present when the police officers questioned Ms. Gordon about the vehicle that Ms. Gordon saw leaving the area the morning after the offenses. Mr. McCarter said that Ms. Gordon initially told the investigating officers that she saw a white Bronco or Blazer with "mudder" tires. The police officer then asked Ms. Gordon if she was sure she did not see a white Dodge truck, and Ms. Gordon said, "Oh, yes, it was a Dodge." Mr. McCarter said that it would have been impossible for a truck to drive the logging road which ran by the house in which the Gordons were staying. Mr. McCarter said that a vehicle would have to exit the woods on to the main road about a mile from the house.

On cross-examination, Mr. McCarter said that he was not present at the trial. Mr. McCarter acknowledged that he did not have first-hand knowledge of the substance of Ms. Gordon's testimony, and he was not aware that Ms. Gordon had been cross-examined at length concerning her initial statement that she saw a white Bronco or Blazer.

Robert Webb, an emergency medical technician, testified that he responded to the call about the discovery of Mr. Griffin's body. Mr. Webb testified that the body was in rigor mortis at the time it was discovered. Mr. Webb said that he lived in that area, and that it was not uncommon to hear gunfire from hunters. Mr. Webb said that there were other residents on Manning Lane.

Richard Allen Ballinger, Sr., and David McClelland were members of the jury at Petitioners' trial. Both testified that the jurors discussed the headlights among themselves in open court. Mr. Ballinger stated that Larry Gibson, another juror, carried a Bible into the deliberation room. Mr. Ballinger described the jurors' responsibility as a "heavy weight." At one point, Mr. Gibson left the group to pray, and Mr. Ballinger comforted him. Mr. Ballinger said that the Bible was not referred to during deliberations but only served to provide some personal comfort to Mr. Gibson. Mr. Ballinger said that to his knowledge, no juror based his or her decisions on any thing other than the evidence and the law. Mr. McClelland testified that none of the jurors discussed any scriptures during deliberations.

Petitioner Dellinger testified that Mr. Miller only visited him twice before trial; one meeting lasted forty-five minutes, and the second meeting lasted between fifteen and twenty minutes. Petitioner Dellinger said that the investigator and Ms. Webb each visited him one time. Petitioner Dellinger said that his counsel did not discuss the case with him, and he was "left out in the dark" about the headlights. Petitioner Dellinger said that his counsel never discussed with him whether or not he would testify, and he did not understand that he had a right to testify. When asked whether he would have testified if given the opportunity, however, Petitioner Dellinger replied, "I don't know." Petitioner Dellinger said that his counsel never asked him about the night of the offenses or whether he had an alibi. He stated that counsel had his statement to the police in which he said he was with Petitioner Sutton during the offenses, "and they just used it and went on it."

At the conclusion of the evidentiary hearing, the post-conviction court found that Petitioners had failed to establish that their respective counsel's assistance at trial or on appeal was deficient, or that they were prejudiced by any omissions on the part of counsel.

III. Standard of Review

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f). When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). "To prove a deficiency in counsel's performance, a petitioner must show that counsel's acts or omissions were so serious that they fell below an objective standard of reasonableness under prevailing professional norms." *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002) (citations omitted). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 697 (1984). "To establish that a deficiency resulted in prejudice, a petitioner 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Nichols*, 90 S.W.3d at 587 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

A petitioner must satisfy both prongs of the *Strickland* test before he or she may prevail on a claim of ineffective assistance of counsel. See *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. *Id.* Failure to satisfy either prong will result in the denial of relief. *Id.* Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

A post-conviction court's findings of fact are conclusive on appeal unless the evidence in the record preponderates against them. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). However, the post-conviction court's application of the law to the facts is reviewed *de novo*, without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to *de novo* review. *Id.*

In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Id.* at 690, 104 S. Ct. at 2066.

IV. Ineffective Assistance of Trial Counsel

A. Failure to Investigate the Sevier County Murder

Both Petitioners argue that their attorneys' assistance was ineffective because they failed to call Mr. McCarter as a witness to rebut Ms. Gordon's testimony at trial. Mr. McCarter testified at the evidentiary hearing that Ms. Gordon initially said that she saw a white Bronco or Blazer the morning after she and Mr. Gordon spotted a fire in the woods. Ms. Gordon, however, did not deny at trial that she at first identified the vehicle as a Bronco or Blazer, and that she later said she saw a white truck with a tool box in the back. At trial, Ms. Gordon testified:

[PROSECUTOR:] And when the officers came out there did you tell one of the officers that you thought it might – the vehicle you saw that Sunday might be a Blazer or Bronco?

[MS. GORDON:] Yes, sir. I was pretty shaken up that night. I was pretty tore up when he found that body in the car and stuff, but after I calmed down and really thought about what I had seen coming out – you know, then when I thought about it, I remembered what I had seen.

[PROSECUTOR:] A Bronco or Blazer, it doesn't have a bed like a truck, but it's enclosed?

[MS. GORDON:] Right. Well, when I thought about it, I thought it couldn't have been a Bronco or Blazer because I could see the back of their heads at the back of the truck – you know, when I was – I was trying to see who it was because there wasn't nobody supposed to be back there, and we were house sitting for these people. All I could see that was the back of their heads in the truck, and I realized that wasn't what I had seen.

[PROSECUTOR:] Okay. Was there anything that you remember being in the back of the bed of the truck?

[MS. GORDON:] Just that it had a tool box on it – one of those big work tool box deals on the back of it.

Both Mr. Webb and Mr. Miller thoroughly cross-examined Ms. Gordon about her conflicting statements concerning the type of vehicle which she saw that Sunday morning. Mr. Miller specifically asked Ms. Gordon if the investigating officers asked her if she saw a white truck. Ms. Gordon replied negatively, but she acknowledged that she told the police officers that she had seen a white truck instead of a Blazer or Bronco when she went to the police station to give her statement.

Ms. Gordon also acknowledged on cross-examination that her testimony at trial was the first time that she had mentioned seeing a tool box in the back of the truck.

Mr. McCarter stated at the evidentiary hearing that he would have testified at trial that the terrain of the road leading from the woods past the house where Ms. Gordon was staying was impassable by motor vehicles. This subject was addressed through Ms. Gordon's cross-examination, and she admitted that she had not walked down the logging road leading into the woods in a number of years, and she had never driven a vehicle on the road.

The post-conviction court implicitly found that even if Petitioners' counsel should have interviewed or called Mr. McCarter to testify, they failed to show that they were prejudiced by such omission:

And [Ms. Gordon's] testimony was contested. The issues relating to her credibility were tested. And those issues apparently were resolved against [Petitioners] on that. And the fact that maybe counsel – or counsel may not have talked to Mr. McCarter before trial, if in fact they did not – and at this point I'm not clear about that – but if they didn't, the fact that her testimony was so contested at trial, in all candor, makes that issue moot. Because it was submitted to the jury and hotly contested, and the jury is the ultimate arbiter of who they believe and what they believe.

Based on our review, we conclude that the evidence does not preponderate against the post-conviction court's finding that Petitioners failed to establish that they were prejudiced by counsel's failure to call Mr. McCarter as a witness at trial.

Petitioner Dellinger argues that his counsel's performance was deficient because he failed to conduct independent investigations of the tire tracks and beer cans found in the vicinity of Ms. Branam's burned car. Counsel Miller said at the evidentiary hearing that he was not given access to this physical evidence in order to conduct his own investigation. Counsel Miller acknowledged that the fingerprints of several potential suspects were on file because they had been incarcerated at various points in time.

At trial, Detective Captain Larry McMann, with the Sevier County Sheriff's Department, testified that two tire track casts were lifted at the crime scene, but the casts did not reveal enough tire tread to identify the make or model of the vehicle. Detective McMann said that his officers gathered approximately forty or fifty beer cans within a radius of one hundred yards from the burned car. Latent fingerprints were present on three of the cans, but these cans were found by the overpass some distance away from the burned car. The fingerprints did not match either Petitioner.

The post-conviction court found "that the investigative process, while it may leave something to have been desired, that as we sit here today, there is no evidence to the contrary that indicated any failure on [counsel's] part to uncover exculpatory evidence." Based on our review of the file, including the transcript of the trial, we conclude that the evidence does not preponderate against the

trial court's finding that Petitioners have failed to show that they were prejudiced by their counsel's deficiencies, if any, in their investigation of the charges against them. Petitioners are not entitled to relief on this issue.

B. Introduction of the Headlights as an Exhibit at Trial

Both Petitioners argue that their respective counsel's assistance was ineffective for failing to personally inspect the headlights from Petitioner Sutton's Camero prior to their introduction as an exhibit at trial. Petitioner Sutton argues that it was his counsel's responsibility to inspect the headlights. Petitioner Sutton contends that because one of the jurors easily discovered the manufacturer's date stamp, that even a " cursory examination " by counsel " would have revealed the problem. " Petitioner Sutton maintains that he should not be blamed for what turned out to be " devastating evidence " because he had been incarcerated prior to trial and did not have access to the car. Petitioner Dellinger argues that his counsel was ineffective for not conducting an independent investigation of the headlights prior to their introduction at trial and for failing to mitigate the situation by seeking a continuance or introducing evidence that would " counter the damage done to the case by the headlight evidence. "

Kenneth Walker and Sharon Davis testified at trial that the dark-colored Camero they saw at the Hunt Road exit on the night that Mr. Griffin was killed had one headlight missing. Counsel Daniel testified that it was their strategy to show that the Camero did not belong to Petitioner Sutton, because all four of the headlights on Petitioner Sutton's vehicle were working at the time of Mr. Griffin's death.

Jimmy Sutton, Petitioner Sutton's brother, testified at trial that Petitioner Sutton owned a 1984 Z-28 Camero Chevrolet at the time of the offenses. The Camero had a painted " bra " across the front. Mr. Sutton said that all of the Camero's headlights were working on February 21, 1992, and none of the headlights had been changed since that date. Mr. Sutton said that when Petitioner Sutton painted the black bra on the Camero, spots or " mists " of paint got on the headlights. Mr. Sutton testified as follows:

[COUNSEL DANIEL]: Okay. And was there something unusual about the headlights that would – you could explain to the jury that's unusual that would be on them, such as paint. Explain that to the jury.

[JIMMY SUTTON]: Yes, sir. There's spots of paint on them – mists of paint where [Petitioner Sutton] had painted that bra on there.

...

[COUNSEL DANIEL]: Did you, at my request, make some photographs of the vehicle as it is today, and as it was, as far as the headlights, back on February the 21st, 1992?

[JIMMY SUTTON]: Yes.

[COUNSEL DANIEL]: I'll show you here two photographs, and does this show the vehicle with the headlights on bright, and shows all four headlights burning?

[JIMMY SUTTON]: Yes.

...

[COUNSEL DANIEL]: And that's the same headlights that was [sic] in that car on February 21, 1992?

[JIMMY SUTTON]: Yes.

...

[COUNSEL DANIEL]: Now, pursuant to my request did you bring that car up here to – drive it over here to the courthouse today?

[JIMMY SUTTON]: Yes.

[COUNSEL DANIEL]: And did you take an officer of the court with you, in particular, Mr. Maner, who is waiting on the jury here, and did he go outside with you as you removed those headlights?

[JIMMY SUTTON]: Yes, I don't know his name, but I can recognize him if I see him.

[COUNSEL DANIEL]: And are those the headlights that you showed Mr. Maner that you took out of the car?

[JIMMY SUTTON]: Yes, it is.

[COUNSEL DANIEL]: Before you took them out did you turn those headlights on bright, and turn them on dim, and show Mr. Maner that they were working?

[JIMMY SUTTON]: Yes, I did.

[COUNSEL DANIEL]: And these are the headlights that you brought, is that correct? This is [sic] the headlights that you brought in here today, is that right?

[JIMMY SUTTON]: Yes.

[COUNSEL DANIEL]: Okay. This headlight, and we don't mark them as to which one, but what is that as shown in the right hand corner, and over in this left hand corner?

[JIMMY SUTTON]: Paint.

Jimmy Sutton then testified that Petitioner Dellinger and Petitioner Sutton came to his house on Friday, February 21, 1992, at approximately 7:30 p.m. in Petitioner Sutton's Camero. Jimmy Sutton stated that all four of the Camero's headlights were working that night. Petitioner Sutton asked Jimmy Sutton to fix a leak in the Camero's water pump, and he and Petitioner Dellinger left a few minutes later in Jimmy Sutton's white Dodge Ram truck. Jimmy Sutton stated that the family took possession of the Camero on March 5, 1992, when Petitioner Sutton was arrested. He said that all of the headlights were working, and the car was parked in Reese Sutton's garage.

Diane Sutton, Jimmy Sutton's wife, testified that she observed all four of the Camero's headlights in working order when Petitioner Sutton and Petitioner Dellinger arrived at her house on February 21, 1992.

Reese Sutton, Petitioner Sutton's uncle, testified that he took possession of the Camero on March 5, 1992, and kept it in his garage for six or seven months "under lock and key." Reese Sutton testified that all of the Camero's headlights were working, and that he did not change the headlights. Leroy Sutton, also Petitioner Sutton's uncle, testified that he stored the Camero in his garage for awhile, and all four of the Camero's headlights were working during that time. Earl Sutton, a neighbor, but not related to Petitioner Sutton, testified that he had seen Petitioner Sutton drive to his trailer at night, and the Camero had working headlights on both sides of the car.

Petitioner Sutton testified at trial concerning the Camero's headlights as follows:

[COUNSEL DANIEL]: Now, did you – you owned – what kind of car did you own when this incident occurred?

[PETITIONER SUTTON]: I owned an '84 Z-28 Camero.

[COUNSEL DANIEL]: How long had you owned the car?

[PETITIONER SUTTON]: Approximately six and a half to seven months.

[COUNSEL DANIEL]: Did you – the statements about the headlights. At the time when this – the fire down there on the 21st, what was the condition of your headlights on your car at that time?

[PETITIONER SUTTON]: They were all burning.

[COUNSEL DANIEL]: Is there any way you know that?

[PETITIONER SUTTON]: Yes. When I first bought the car – like I said, I had had the car, I guess, probably six months. When I first bought the car, the car had a headlight out – when I first bought the car, and I don't really remember which side it was, but I remember it had one out, and I had to put a new headlight in it. All of the lights on my car worked.

[COUNSEL DANIEL]: Okay. Were they working on the 21st of February, 1992?

[PETITIONER SUTTON]: Yes, they was [sic].

[COUNSEL DANIEL]: All four of them?

[PETITIONER SUTTON]: Yes, they was [sic].

[COUNSEL DANIEL]: The same headlights still in that car today, as far as you know?

[PETITIONER SUTTON]: Yes.

[COUNSEL DANIEL]: Were they working at the time when you were arrested?

[PETITIONER SUTTON]: Yes, they was [sic].

[COUNSEL DANIEL]: Now, there's some pictures that's been shown here of your car that show some painting on the front, and I believe we've referred to that as – commonly referred to as a bra, is that correct?

[PETITIONER SUTTON]: Yeah, that's right.

[COUNSEL DANIEL]: Did you paint that car?

[PETITIONER SUTTON]: Yeah, I did.

[COUNSEL DANIEL]: And how many times – you said you painted it more than once after you bought it?

[PETITIONER SUTTON]: Yes. Yeah, I painted it three or four times, I guess – you know, touched it up where I'd skinned it – you know, and stuff in that nature, or working on it – you know, and stuff.

[COUNSEL DANIEL]: Is that after you put the other headlight in it?

[PETITIONER SUTTON]: Yes.

The State called as a rebuttal witness William Martin Barnes, manager of manufacturing at the Wagner Lighting Plant in Sevierville, to explain the significance of the date code on the headlight. Mr. Barnes testified that the United States Department of Transportation requires every manufacturer of motor vehicle headlights to imprint a date code showing the date of the headlight's manufacture on the seal beam. Mr. Barnes testified that the date code on the headlight introduced as an exhibit at trial indicated that the headlight was manufactured on February 13, 1992, which date was after Petitioner Sutton purchased the Camero, according to Petitioner Sutton's testimony. Mr. Barnes acknowledged that the headlight could not have been placed in the Camero at the time Petitioner Sutton purchased the car.

A criminal defense attorney "must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed." *Baxter*, 523 S.W.2d at 933. However, "'counsel has the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Nichols*, 90 S.W.3d at 587 (quoting *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2052). The reasonableness of counsel's investigative actions "may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. Moreover, counsel's conduct must be "assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Burns*, 6 S.W.3d at 462.

Petitioner Sutton cites several cases in support of his argument. However, these cases are distinguishable. The situation in the case *sub judice* is not a matter of counsel's misunderstanding of the law, *Gardner v. State*, 96 S.W.3d 120 (Mo. Ct. App. 2003), or failure to understand the charges against his client, *United States v. Goodwin*, 531 F.2d 347 (6th Cir. 1976), or failure to act on exculpatory evidence within counsel's possession, *Burns*, 6 S.W.3d at 462-63.

Nor is this a case where defense counsel introduced evidence which defense counsel knew contained information damaging to the defendant, but took no steps to eliminate or mitigate the damage. See *United States v. Bosch*, 584 F.2d 1113, 1122 (1st Cir. 1978) (holding counsel's introduction of bail motion that referred to the defendant's prior convictions was deficient conduct); *Sager v. Maass*, 907 F. Supp. 1412 (D. Ore. 1995) (holding counsel's introduction of the victim's entire impact statement as a handwriting sample and as impeachment evidence was deficient conduct). In both of these cases, defense counsel was aware of the damaging evidence, but made a unilateral decision, whether through neglect or carelessness, nonetheless to introduce the evidence.

In the case *sub judice*, however, Petitioner Sutton's strategy of undermining the State's alleged motive for Ms. Branum's killing rested, in part, upon showing that the Camero spotted at the scene of Mr. Griffin's arrest was not Petitioner Sutton's Camero. The State at trial alleged that Ms. Branum was murdered by Petitioners to keep her from discovering what had happened to her brother, Tommy Griffin. Petitioner Sutton contended that the Camero with the faulty headlights spotted shortly before Mr. Griffin's arrest the night he was killed was not his Camero. Unlike the situation presented in *Bosch* and *Sager*, Counsel Daniel did not make a unilateral decision to introduce the headlights. On the contrary, six defense witnesses, including Petitioner Sutton, were interviewed prior to trial and each testified at trial that all four of the Camero's headlights were working on or near February 21, 1992, and none of the headlights had been changed since that date. Jimmy Sutton, Petitioner's brother, and a police officer tested the headlights in the courthouse parking lot before they were removed and brought into the courtroom. Jimmy Sutton testified that the headlights were flecked with paint prior to Mr. Griffin's murder, and he identified at trial the paint spots on the headlights removed from Petitioner Sutton's Camero.

Nor is it clear from the record, as Petitioner Sutton contends, that "even a brief examination of the headlight by counsel would have revealed the problem." Petitioner Sutton did not introduce the Camero's headlights as an exhibit at the post-conviction hearing. At the hearing, Counsel Daniel testified that he examined the headlights when they were brought into the courtroom, but he did not notice a manufacturer's stamp. Counsel Miller stated that although a manufacturer's stamp was visible on the headlight, without specialized knowledge, a lay person probably would not have known what the numbers meant. The headlights were passed to several jurors before one of the panel noticed the stamp. The State called a rebuttal witness to explain the significance of the manufacturer's coding on the headlight.

Petitioner Sutton submits that it was not necessary to introduce the headlights as an exhibit at trial, and counsel's conduct in this regard was "careless and not the result of trial strategy." Despite his assertion that there was no reason to physically introduce the headlights, the decision to do so reflected sound trial strategy based on Petitioner Sutton's and Jimmy Sutton's testimony at trial concerning the unique paint markings on the headlights of Petitioner Sutton's Camero. Clearly, from Petitioner Sutton's viewpoint, it would have been prudent to stop with the testimony of the defense witnesses. However, as the trial court found, "for [Petitioner Sutton] to say that [counsel] failed to protect him from his own misguided attempts to undermine the judicial system through fraud is disingenuous." Based on all of the foregoing, we conclude that the evidence does not preponderate

against the post-conviction court's finding that Counsel Daniel's actions in this regard did not fall below the objective standard of reasonableness demanded of defense attorneys.

Petitioner Dellinger argues that his counsel rendered ineffective assistance because they failed to personally examine the headlights prior to their introduction at trial, and because they failed to introduce any type of evidence that would counter the damaging effects arising out of the introduction of the headlights as an exhibit. Counsel Miller testified that he was aware of and relied on Counsel Daniel's presentation of the headlight testimony and evidence because the defense strategy, if successful, would have benefitted both Petitioners. Petitioner Dellinger does not suggest what specific evidence his counsel should have presented or what information Petitioner Dellinger could have provided had he been called to testify on this issue. We conclude that Petitioner Dellinger has failed to establish that his counsel's representation in this regard was deficient.

C. Failure to Investigate Mr. Griffin's Murder

Petitioner Dellinger argues that his counsel were ineffective because they failed to conduct any investigation of the facts and circumstances surrounding Mr. Griffin's murder in Blount County, particularly the timing of his death. Specifically, Robert Webb testified at the evidentiary hearing that he lived near the area where Mr. Griffin's body was found, and that there were houses in the vicinity on Manning Lane. He stated that it was not unusual to hear gunfire in the area because this location was frequently hunted. Mr. Webb also stated that rigor mortis was present when Mr. Webb recovered Mr. Griffin's body on February 24, 1992.

Petitioner Dellinger also argues that his counsel's performance was deficient because they failed to investigate the notation in the autopsy report that a small amount of partially digested food was present in Mr. Griffin's stomach at the time of the autopsy. At the post-conviction hearings, the parties agreed to stipulate that Ray Herren, a corrections officer with the Blount County Sheriff's Department, would testify that Mr. Griffin was not given any food while he was in jail on February 21, 1992. In addition, Petitioner Dellinger submits that his counsel were deficient for failing to investigate the degree of rigor mortis which was present when Mr. Griffin's body was found on February 24, 1992.

We glean the facts pertinent to Petitioners' issue from the summary of the facts presented by our Supreme Court in *State v. Dellinger*, 79 S.W.3d 458 (Tenn. 2002), and the facts summarized by this Court in the direct appeal in *State v. James Henderson [sic] Dellinger and Gary Wayne Sutton*, No. E1997-00196-CCA-R3-DD, 2001 WL 220186 (Tenn. Crim. App., at Knoxville, Mar. 7, 2001). Mr. Griffin was booked into the Blount County Jail at 7:40 p.m. on February 21, 1992, and released into Petitioners' care at 11:25 p.m. *Dellinger*, 79 S.W.3d at 463-64. Jason McDonald testified that he heard two gunshots fired at 11:55 p.m. that night in the Blue Springs/Blue Hole area where Mr. Griffin's body was later found. *Id.* at 464. Counsel Miller stated at the post-conviction hearing that although he did not have an independent recollection of reviewing the autopsy report, the report was in his files. Counsel Miller acknowledged that he did not hire a forensic pathologist to review the autopsy report. Petitioner Dellinger contended at the post-conviction hearing that the digestive

process is four hours long, and, therefore, if Mr. Griffin had eaten something after he was released from the Blount County Jail, his time of death would have to be later than 11:55 p.m. Petitioner Dellinger, however, did not offer any medical testimony at the evidentiary hearing in support of his contention as to the length of a person's digestive process, or the relationship between the presence of "partially digested" food in the body and Mr. Griffin's time of death. Even accepting *arguendo* the four-hour time line suggested by Petitioner Dellinger, it is not inconceivable that Mr. Griffin ate something after he was released from jail at 11:25 p.m., which food was partially digested at the time of his death.

The rigor mortis issue was hotly contested in the Blount County trial. *See Dellinger*, 2001 WL 220186, at **6-10. Dr. Ellington, the physician who conducted the autopsy of Mr. Griffin, did not establish a time of death for the victim, but he observed on cross-examination that the emergency technician's report noted that rigor mortis was present in Mr. Griffin's body when it was recovered at 5:50 p.m. on February 24, 1992. Dr. Ellington acknowledged that according to textbooks on the subject, rigor mortis sets in about thirty minutes after death and lasts from twenty-four to thirty-six hours after death. *Id.* at *6. Robert Webb, the emergency medical person who assisted in recovering Mr. Griffin's body testified as a defense witness and stated that rigor mortis was present. *Id.* at *9. The defense called Dr. Larry Wolfe as a witness. Based on his review of the victim's autopsy and photographs, Dr. Wolfe testified that the estimated time of death was twenty-four to thirty-six hours prior to the body's discovery. *Id.* at *9-10. The State called Dr. Charles Harlan, a forensic pathologist, as a rebuttal witness. Based on his review, Dr. Harlan testified that Mr. Griffin died between 6:00 p.m. on February 21, 1992, and 8:00 a.m. on February 22, 1992. *Id.* at *10.

At the trial in Sevier County, the State entered a stipulation, agreed upon by defense counsel, that Dr. Ellington would testify, if called upon to do so, that he performed an autopsy on Mr. Griffin on February 25, 1992, that he determined the cause of death was a gunshot wound to the head, that there was extensive damage to the victim's brain, and that he removed shot pellets and wadding from the victim's skull which he turned over to the Blount County Sheriff's Department. The emergency medical personnel who recovered Mr. Griffin's body on February 24, 1992, were not called to testify.

The post-conviction court found that, regardless of what further investigations counsel might or should have done, Petitioners failed to show that they were prejudiced by any deficiencies in their counsel's representation. In regard to Petitioners' trial for the murder of Ms. Branum, the post-conviction court found "that this was the most complete case of circumstantial evidence that this Court has ever seen . . . and much more compelling than any eyewitness case that [the trial court had] ever seen. It fit like a glove."

Even assuming that Petitioners' Sevier County counsel should have investigated Mr. Griffin's murder in Blount County more thoroughly (as was purportedly done by Petitioners' counsel at the Blount County trial), Petitioners have failed to establish that there is a reasonable probability that such investigation would have led to any different result in Petitioners' Sevier County trial. The evidence does not preponderate against the trial court's finding that Petitioners failed to establish that

they were prejudiced by their counsel's conduct in this regard. Petitioners are not entitled to relief on this issue.

D. Petitioner Dellinger's Right to Testify

Petitioner Dellinger argues that his counsel's assistance was ineffective because they failed to prepare him to testify at trial, especially after the "devastating" introduction of the headlights from Petitioner Sutton's Camero. Petitioner Dellinger contends that, "[a]t minimum, the defense counsel had a duty to meet with [him] and discuss the possibility of his testifying." Petitioner Dellinger acknowledges that the procedural requirements set forth in *Momon v. State*, 18 S.W.3d 152 (Tenn. 1999), were not in place at the time of his trial, but contends that his counsel's failure to discuss the possibility of testifying deprived him of his constitutional right to testify.

Counsel Miller testified that the defense team met several times with Petitioner Dellinger, either individually or as a group. While he did not have an independent recollection of their discussion concerning Petitioner Dellinger testifying at trial, Counsel Miller stated that he would have discussed the issue with him. Counsel Miller said that in this particular case he would have advised against testifying because of the number of statements both Petitioners had made to the investigating officers prior to trial, but the final decision was Petitioner Dellinger's to make. Counsel Miller said that Petitioner Dellinger chose not to testify.

The post-conviction court specifically accredited Counsel Miller's testimony concerning the extent of his discussions with Petitioner Dellinger. The post-conviction court found,

[a]s to [Petitioner] Dellinger, the Court quite candidly finds his testimony to be incredible. He is not able to explain on direct examination or cross-examination a whole lot of specifics other than "They didn't talk to me." And when you look at the file that [Counsel] Miller brought in here and the work that was done pretrial on motions, extensive motions, quite candidly sometimes *ad nauseam* motions, the Court hereby finds that Mr. Miller's testimony on the amount of work and his relationship with his client to be far more credible than it does [Petitioner] Dellinger's.

The evidence does not preponderate against the post-conviction court's finding that Petitioner Dellinger made an informed decision not to testify. Petitioner Dellinger is not entitled to relief on this issue.

V. Ineffective Assistance of Appellate Counsel

Both Petitioners argue that their appellate counsel were ineffective because they failed to appeal the trial court's denial of their motion for a change of venue and their motion to suppress the evidence found as a result of the search of Petitioner Dellinger's residence. The post-conviction court did not make any explicit findings as to whether the failure to appeal these issues constituted

deficient representation or whether the omissions were prejudicial to Petitioners. Based on its overall review of the extent and thoroughness of counsel's activities throughout the trial and appellate process, however, the trial court implicitly found that appellate counsel's choice of issues to raise on appeal did not fall below the standards demanded of criminal attorneys.

Initially, we note that a criminal defendant has a constitutional right to counsel on his first appeal, and this right necessarily includes the right to effective assistance of counsel. *Cooper v. State*, 849 S.W.2d 744, 746 (Tenn. 1993) (citing *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)). However, "[a]ppellate counsel are not constitutionally required to raise every conceivable issue on appeal." *Carpenter v. State*, 126 S.W.3d 879, 887 (Tenn. 2004). The decision as to which issues to raise on appeal is generally within appellate counsel's discretion and "should be given considerable deference. . . . if such choices are within the range of competence required of attorneys in criminal cases." *Id.* The same principles applicable to deciding the effectiveness of trial counsel apply to appellate counsel. That is, Petitioners must show not only that appellate counsel's performance was deficient, but they must also show that they were prejudiced by appellate counsel's deficient conduct. *Strickland*, 466 U.S. at 693. To demonstrate prejudice, Petitioners must show that there is a reasonable probability that the result on appeal would have been different but for the errors of counsel. *Dean v. State*, 59 S.W.3d 663, 668-69 (Tenn. 2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

A. Motion for Change of Venue

David Webb recollected at the evidentiary hearing that some of the prospective jurors expressed familiarity with the case. Susanna Webb also had similar recollections, but she did not recollect whether or not she had used all of her peremptory challenges. The prospective jurors were extensively questioned to determine if any of them had been prejudiced by pretrial publicity. Petitioner Dellinger points to Juror Seaton's voir dire as an example of the extent of pretrial publicity. Juror Seaton, like many jurors, stated that he had formed an opinion as to the case, and that he would not be able to change that opinion based on the evidence presented at trial. The trial court excused Juror Seaton from the venire as well as several other prospective jurors who expressed similar viewpoints.

The grant or denial of a motion for change of venue is left to the sound discretion of the trial court. *State v. Howell*, 868 S.W.2d 238, 249 (Tenn. 1993). The mere fact that jurors have been exposed to pretrial publicity will not warrant a change of venue, nor will prejudice be presumed on a mere showing of extensive publicity. *State v. Kyger*, 787 S.W.2d 13, 19 (Tenn. Crim. App. 1989); *State v. Stapleton*, 638 S.W.2d 850, 856 (Tenn. Crim. App. 1982). "The ultimate test is whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity." *Kyger*, 787 S.W.2d at 18-19 (citing *State v. Garland*, 617 S.W.2d 176, 187 (Tenn. Crim. App. 1981)).

Based on our review of the record and the extensive voir dire of the venire, we conclude that Petitioner Dellinger has failed to show that he was prejudiced by appellate counsel's failure to raise this issue on appeal. Petitioner is not entitled to relief on this issue.

B. Motion to Suppress

Petitioner Dellinger argues that his appellate counsel's assistance was ineffective because he failed to appeal the trial court's denial of his motion to suppress the evidence found at his residence. Counsel Miller stated at the evidentiary hearing that he was surprised that the State defended the search of Petitioner Dellinger's residence under the theory that Linda Dellinger had consented to the search. Counsel Miller acknowledged that he was prepared to argue at the suppression hearing that the affidavit supporting the request for a search warrant lacked probable cause because it included material misrepresentations of fact. Counsel Webb did not testify during the second day of the evidentiary hearing. The State, however, entered a stipulation, agreed upon by Petitioners' counsel, that Counsel Webb would testify if called that she did not interview Ms. Dellinger prior to the suppression hearing. Petitioners' counsel entered a stipulation, agreed upon by the State, that Linda Dellinger would testify if called that she did not consent to the search of her residence, and that the investigating officers searched the premises pursuant to a search warrant.

At the suppression hearing, the State argued that the search warrant was valid, but, in any event, that Linda Dellinger consented to the search. Detective Widener and Officer McMahan testified that Ms. Dellinger arrived at her home soon after they did, and gave the officers permission to search her residence. Detective Widener said that after Ms. Dellinger granted them entry to the house, he read the search warrant to her. Agent Griswold, with the T.B.I., later interviewed Ms. Dellinger concerning the property discovered in her home. Agent Griswold read Ms. Dellinger her *Miranda* rights, and she executed a written waiver. In her statement, Ms. Dellinger stated, "I told Blount County/Sevier County that they had permission to search our house when it was searched." David Hutchison, a criminal investigator with the District Attorney's Office, subsequently telephoned Ms. Dellinger and taped the conversation. During this conversation, Ms. Dellinger again stated that she had consented to the investigating officers' search of her residence. Ms. Dellinger was present at the suppression hearing but was not called by defense counsel to testify.

Petitioner Dellinger has failed to show that he was prejudiced by the failure of his counsel to challenge the trial court's denial of the motion to suppress on appeal. Assuming *arguendo* that counsel's conduct was deficient in this regard, the Tennessee Supreme Court has concluded that the challenged search warrant was valid, and that no error occurred in its execution. *State v. Dellinger*, 79 S.W.3d at 472. Petitioner Dellinger is not entitled to relief on this issue.

VI. Jury issues

Petitioners argue that the jury was exposed to improper influence because one of the jurors possessed a Bible during deliberations. Petitioners also contend that the rule of sequestration was violated when the jurors were allowed to participate in "family night" while they were sequestered.

Initially, the State argues that Petitioners have waived any issues as to improper jury conduct or separation because Petitioners failed to present these issues in their direct appeal. The State, however, did not assert the defense of waiver at the evidentiary hearing, and thus, according to our Supreme Court, the State's waiver issue has itself been waived. *Walsh v. State*, 166 S.W.3d 641, 645 (Tenn. 2005). "Issues not addressed in the post-conviction court will generally not be addressed on appeal." *Id.* (citing *Rickman v. State*, 972 S.W.2d 687, 691 (Tenn. Crim. App. 1997)); *see also Kevin B. Burns v. State*, No. W2004-00914-CCA-R3-PD, 2005 WL 3504990, *44 (Tenn. Crim. App. at Jackson, Dec. 21, 2005). Although the post-conviction court did not make any explicit findings as to Petitioners' allegations of improper influence or sequestration of the jury, the court, by its findings, implicitly concluded that Petitioners failed to show they were entitled to relief on this issue.

A. Jury Misconduct

At the evidentiary hearing, Mr. Ballinger, a member of the jury at Petitioners' trial, testified that one of the jurors, Larry Gibson, possessed a Bible during deliberations at the guilt phase of Petitioners' trial. We observe at the outset that portions of both the State's and defense counsel's examinations of Mr. Ballinger on this issue exceeded the parameters of permissible evidence set forth in *Walsh*.

Rule 606(b) of the Tennessee Rules of Evidence provides that:

[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

In *Walsh*, our Supreme Court concluded that Rule 606(b) "permits juror testimony to establish the fact of extraneous information or improper influence on the juror; however, juror testimony concerning the effect of such information or influence on the juror's deliberative processes is inadmissible." *Walsh*, 166 S.W.3d at 649. Once the petitioner proves that "a juror was exposed to extraneous prejudicial information or subjected to improper influence, a rebuttable presumption of prejudice arises, and the burden shifts to the State to explain the conduct or demonstrate that it was harmless." *Id.* at 647 (citing *State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984)). Although the State may not inquire as to the effect of the improper influence on a juror's deliberative process, the State may rebut a presumption of prejudice by questioning other members of the jury as to whether or not they heard or saw the improper influence. *Id.* at 649.

Although Mr. Ballinger acknowledged that Mr. Gibson physically possessed a Bible during deliberations, he testified that Mr. Gibson did not read from the Bible during deliberations, and that he and Mr. Gibson did not discuss any specific scriptures during deliberations. Mr. McClelland, another member of the jury panel, testified that he did not observe or hear any individual jurors discussing scripture during deliberations.

Petitioners contend that the mere presence of a Bible in the jury room during deliberations constituted an impermissible extraneous prejudicial influence on the jury, citing *State v. Harrington*, 627 S.W.2d 345 (Tenn. 1981). We conclude, however, that under the facts presented in this case, Petitioners have failed to make an initial showing that the jury was exposed to extraneous prejudicial information. Petitioners' case is distinguishable from the situation presented in *Harrington*. In *Harrington*, the jury foreman "buttressed his argument for imposition of the death penalty by reading to the jury selected biblical passages," warranting a new sentencing hearing. *Harrington*, 627 S.W.2d at 350. In the case *sub judice*, there is no evidence that any juror was improperly exposed to extraneous information during the deliberation process. Petitioners are not entitled to relief on this issue.

B. Failure to Sequester the Jury

At the time of Petitioners' trial, "[i]n all criminal prosecutions except those in which a death sentence may be rendered, the judge of the criminal court may, in his discretion, with the consent of the defendant, and with the consent of the district attorney general, permit the jurors to separate at times when they are not engaged upon the actual trial or deliberation of the case." T.C.A. § 40-18-116 (1992). "[T]he test of keeping a jury 'together' is not a literal one, requiring each juror to be at all times in the presence of all others." *State v. Bondurant*, 4 S.W.3d 662, 671 (Tenn. 1999). Rather, "[t]he real test is whether a juror passes from the attendance and control of the court officer." *Id.* "Once a defendant shows that a [sequestered] jury has been separated, the burden shifts to the State to show that such separation did not result in prejudice to the defendant." *State v. Jackson*, 173 S.W.3d 401, 410 (Tenn. 2005) (citing *Gonzales v. State*, 593 S.W.2d 288, 291 (Tenn. 1980)). "If the State fails to meet the burden of showing that the separation did not result in prejudice, a new trial is required." *Bondurant*, 4 S.W.3d at 672.

Petitioners contend that the jurors were impermissibly separated from the court officers during a "family night" which was held at the motel in which they were staying for the duration of the trial. Mr. Ballinger described the event as being held in a "big room" where the "family came in and just visited, and we were right there in that area." Mr. Ballinger stated, "I don't even remember walking out of there going anywhere else, because I think it was upstairs, anyway." Mr. Ballinger acknowledged that no one monitored his private conversation with his family members.

The State posed the following questions during Mr. Ballinger's cross-examination:

[THE STATE:] Family night, to your knowledge, was anything discussed about the trial or the evidence when you spoke with your wife or whoever was there.

[MR. BALLINGER:] No, we were instructed not to talk about anything going on and not to talk about newspaper or TV or anything that might be tied to it. And those conversations were basically taboo.

[THE STATE:] Were officers there in that room, also?

[MR. BALLINGER:] Yeah, I don't remember (sic). I know they were escorting people, and they were always there assisting us and very – so courteous to us and all that. I don't know that they were there that specific moment or time.

[THE STATE:] Yes, sir. To your knowledge, did any of the jurors violate those instructions you had been given . . . not talking about the case or anything such as that.

[MR. BALLINGER:] Not to my knowledge.

Mr. McClelland confirmed that the gathering was held in the motel's conference room. Mr. McClelland "honestly [didn't] remember" whether the gathering was supervised. At the end of Mr. McClelland's cross-examination, the Court inquired as to whether any impermissible discussions about the case took place during the family gathering. Mr. McClelland responded, "Definitely not from myself, and not that I was aware of."

Based upon our review of the record, we conclude that Petitioners have failed to present clear and unequivocal evidence that the jurors were outside the presence of the court officers during the family gathering. *See, e.g., Bondurant*, 4 S.W.3d at 673 (concluding that court officer's affidavit unequivocally stating that he had no control over the jury members as they individually traveled between the motel and the courthouse presented more than the possibility of a separation). Both jurors testified that the gathering was confined to one large room, and there is no evidence that any jurors left the conference room to visit with their family members without supervision. Although the jurors could not remember where the court officers were stationed during the gathering, Mr. Ballinger observed that the officers "were always there assisting us." Petitioners are not entitled to relief on this issue.

VII. Brady Issues

Petitioners argue that the State violated the requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by failing to disclose Detective Gourley's memorandum concerning his telephone conversation with Agent Gregory about Lester Johnson and the

correspondence from Mr. Turner and Mr. Floyd. Petitioners contend that the undisclosed information contained in the documents would have provided evidence that other individuals had the motive and opportunity to kill Mr. Griffin and Ms. Branum. The State argues that there is no evidence that the Sevier County authorities were in possession of Detective Gourley's memorandum. In any event, the State contends that the letters from Mr. Turner and Mr. Floyd did not contain any exculpatory evidence, and neither source of information was material to Petitioners' case.

In *Brady*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* 373 U.S. at 87, 83 S. Ct. at 1196-97. "Evidence 'favorable to the accused' includes evidence deemed to be exculpatory in nature and evidence that could be used to impeach the state's witnesses." *Johnson v. State*, 38 S.W.3d 52, 55-56 (Tenn. 2001) (citations omitted).

In order to establish a *Brady* violation, the defendant must show the following four elements:

- 1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
- 2) that the State suppressed the information;
- 3) that the information was favorable to the accused; and
- 4) that the information was material.

Id. at 56 (citing *State v. Walker*, 910 S.W.2d 381, 389 (Tenn. 1995); *State v. Copeland*, 983 S.W.2d 703, 706 (Tenn. Crim. App. 1998)).

Both Petitioners made general *Brady* requests prior to trial. The post-conviction court found that Petitioners had also satisfied the second element. The letters from Mr. Taylor and Mr. Floyd were addressed to investigating officers in the Sevier County Sheriff's Department. As for Detective Gourley's memorandum, Petitioners' counsel stated at the evidentiary hearing that he retrieved the document from the files of the Blount County Sheriff's Department. Because of the close interrelationship between the investigations conducted by the Sevier County and Blount County authorities, the post-conviction court found that "that information contained in the investigative offices of the Blount County Sheriff's Department, who investigated in [the Sevier County] case and who testified in this case, would be information that would have to be, under *Brady*, certainly disclosed." The post-conviction court, however, found that the information in the proffered documents, by itself, was not exculpatory, and there was no evidence that either Mr. Floyd or Mr. Johnson were connected with the case.

We agree with the post-conviction court's finding that Mr. Floyd's general promises of information about the Griffins is not, in itself, exculpatory. Moreover, the letter by itself does not provide any "information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than [Petitioners] killed the victim." *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). Although counsel may not have seen Mr. Floyd's letter, Counsel Daniel explored at trial the connection between Mr. Floyd and Mr. Griffin based on information provided by Petitioner Dellinger. That is, that Mr. Griffin had previously bought drugs from Mr. Floyd, and that when Mr. Floyd was arrested for dealing in drugs, there were rumors that Mr. Griffin provided the officers with the information needed to make the arrest. Detective Widener acknowledged at trial that he was aware of this information.

Nor do we find the information in Detective Gourley's memorandum to be exculpatory. Agent Gregory acknowledges that Mr. Johnson and Petitioners were "close associates." He states that Tommy Griffin and Connie Branum were scheduled to testify for the State, in a manner favorable to the victim at Mr. Johnson's trial for attempted first degree sexual assault offense. Agent Gregory stated, "Griffin did not show up for the trial. It is unknown at this time if Branam [sic] did. Several places were shot up in Sevier Co. with a shotgun prior to the trial. Threats were made to most of the State's witnesses, judge and prosecutor." Mr. Johnson was found not guilty and released from custody in Jackson County, North Carolina, sometime around 6:00 p.m. on February 21, 1992. While it is possible for Mr. Johnson to have traveled from the courthouse in Sylva, North Carolina, to Sevier County, Tennessee, before midnight, there is nothing in the record to indicate that he did so, nor is there any indication that he was in Sevier County when Ms. Branum was killed.

Even if we conclude, however, that some of the information contained in this evidence was exculpatory, it does not satisfy the *Brady* materiality requirement. In *State v. Edgin*, 902 S.W.2d 387 (Tenn. 1995), our Supreme Court adopted the standard of "materiality" set forth in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), that is, that the

"touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"

Edgin, 902 S.W.2d at 390 (quoting *Kyles*, 514 U.S. at 434, 115 S. Ct. at 1566) (citations omitted)).

Neither the letters nor Detective Gourley's memorandum leads us to conclude that there is a "reasonable probability" that the result would have been different had the information been disclosed. Petitioners' counsel, according to the trial transcript, were aware of and explored Mr. Floyd's connection with Mr. Griffin. As for Mr. Johnson's possible role in the offenses, there is no evidence that he was in Sevier County at the time of the offenses to elevate the connection, as the post-conviction court found, beyond a "mere conjecture or possibility." Regardless of Mr. Johnson's

whereabouts on February 21, 1992, the testimony at Petitioners' trial for Ms. Branum's murder clearly placed Ms. Branum in Petitioners' company shortly before the fire from her car was spotted by the Gordons. Based upon our review of the record, we conclude that the evidence does not preponderate against the post-conviction court's finding that the State's failure to disclose this evidence does not undermine confidence in the outcome of the trial. Petitioners are not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgments of the post-conviction court.

THOMAS T. WOODALL, JUDGE